

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

VENSON LEWIS GIVHAN,

Defendant-Appellant.

---

UNPUBLISHED

January 4, 2005

No. 245107

Wayne Circuit Court

LC No. 01-011848

Before: Neff, P.J., and Cooper and R.S. Gribbs\*, JJ.

PER CURIAM.

Defendant Venson Lewis Givhan appeals as of right his jury trial convictions for first-degree premeditated murder,<sup>1</sup> felon in possession of a firearm,<sup>2</sup> and possession of a firearm during the commission of a felony.<sup>3</sup> Defendant was sentenced to life imprisonment for his murder conviction, and twenty months to five years' imprisonment for his felon in possession conviction, to be served consecutive to a two-year term of imprisonment for his felony-firearm conviction. We reverse defendant's convictions and remand for a new trial based on newly discovered evidence.

**I. Background Facts**

Defendant's convictions arose from the fatal shooting of John Brazier outside of Green's Barbeque in the city of Detroit in the early morning hours of September 22, 2001. Mr. Brazier and defendant had formerly been friends and Mr. Brazier was defendant's landlord. However, on August 18, 2001, Mr. Brazier told his fiancée, Carla Threat, that he intended to evict defendant for failing to pay his rent. When Mr. Brazier actually confronted defendant, an argument erupted and Mr. Brazier hit defendant, knocking him down. Following this altercation,

---

<sup>1</sup> MCL 750.316(1)(a).

<sup>2</sup> MCL 750.224f.

<sup>3</sup> MCL 750.227b.

---

\* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

defendant carried a gun across the street to the home of Mr. Brazier's sister, Diane Brazier. In the presence of Ms. Brazier, Mr. Brazier's mother and cousin, Luckie Winters, defendant threatened to kill Mr. Brazier. Shortly thereafter, defendant shot at Ms. Brazier's home from his front porch.<sup>4</sup>

Subsequently, Mr. Brazier, with the help of Hasheen Henderson, placed defendant's belongings on the front porch of the house. Mr. Brazier and Mr. Henderson watched defendant collect his belongings the following day. Defendant insulted Mr. Brazier, but drove off at his aunt's insistence. Mr. Henderson testified that defendant stopped his vehicle down the street and entered the backseat of another. The second vehicle passed Ms. Brazier's home and defendant again shot at the house.<sup>5</sup> On September 18, 2001, as Mr. Brazier left Green's Barbeque in the early morning hours, he claimed that defendant shot at his vehicle. Mr. Brazier later told Ms. Threat that he retaliated by shooting at the home of defendant's aunt.<sup>6</sup>

In the early morning hours of September 22, 2001, Mr. Brazier was again at Green's Barbeque with Mr. Winters. While Mr. Winters was in the restroom, he heard gunfire and learned that Mr. Brazier had gone outside. Mr. Brazier had been shot and was taken to the hospital where he died from his injuries. Mr. Winters testified that he did not want to speak to the police at the hospital because they had failed to act upon the earlier reported shootings. He also testified that he told the police at that time that he would take care of the matter himself.

Mr. Winters testified to giving a statement to the police later that morning. At that time, he told the police that Mr. Brazier was shot by defendant while six or seven feet away from the restaurant door. Mr. Winters indicated that defendant was flanked by his cousins and that the men ran in separate directions following the shooting. Subsequently, Mr. Winters, claiming a change of heart, gave the police another statement on September 28. This statement was consistent with Mr. Winters's testimony at defendant's trial. Mr. Winters testified that he and Mr. Brazier met at the restaurant door. Defendant was about ten feet away and was flanked by two unknown men. Defendant raised his gun and pulled the trigger, but it did not fire. At trial, Mr. Winters admitted that he lied in his first statements.

However, Mr. Winters's testimony was contradicted by another witness to the shooting. The parking lot attendant on duty the night of the shooting testified that he heard gunshots and saw Mr. Brazier run from an alley into the parking lot. He testified that the shooter did not follow Mr. Brazier or stand in front of the restaurant door following the shooting.

The defense asserted that defendant had been at a family party that night. At the time of the shooting, defendant claimed to be intoxicated and asleep on his aunt's couch. Defendant's

---

<sup>4</sup> Defense witnesses contradicted this series of events, claiming that defendant was knocked unconscious by Mr. Brazier and was taken to the hospital, not returning until the following day.

<sup>5</sup> This testimony was contradicted by defendant's aunt who testified that defendant immediately drove away, without turning back.

<sup>6</sup> We note that all of the shootings involved in this ongoing dispute were reported to the police.

cousin, Teia Givhan, testified that she returned home at 3:13 a.m., and found defendant asleep. She testified that she was certain of the time, as she had received a phone call as she returned home and the time appeared on her bill.

## II. Evidentiary Issues

Defendant challenges the admission of Mr. Brazier's statement to Ms. Threat regarding his feud with defendant. Defendant also challenges the exclusion of Mr. Winters's initial statement at the hospital. Generally, a trial court's decision to admit evidence will be reversed only for an abuse of discretion.<sup>7</sup> However, when a trial court's decision regarding the admission of evidence involves a preliminary question of law, this Court reviews the issue de novo.<sup>8</sup>

### A. Admission of Victim's Statements under MRE 803(3)

Defendant argues that the trial court erred in granting the prosecutor's motion in limine to introduce statements made by Mr. Brazier to Ms. Threat before he actually evicted defendant. MRE 803(3) excludes from the definition of hearsay "[a] statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as *intent*, *plan*, motive . . .).]"<sup>9</sup> Mr. Brazier told Ms. Threat of his "intent" and "plan" to evict defendant if he did not pay the rent. This statement is clearly within the scope of MRE 803(3). The statement was relevant to explain the existing feud between defendant and Mr. Brazier, and gave rise to defendant's motive for allegedly killing Mr. Brazier. As noted by the trial court, the reason for the feud was not particularly important. Furthermore, there was ample direct evidence of the feud and of defendant's motive. However, the fact that the feud concerned a rental dispute was not particularly prejudicial. Thus, the trial court properly admitted the statement pursuant to MRE 403 as its probative value was not substantially outweighed by the danger of unfair prejudice.

### B. Admission of Mr. Winters's Inconsistent Statement

Defendant also argues that the trial court abused its discretion in refusing to admit Mr. Winters's statement to the police at the hospital immediately following the shooting. The prosecutor concedes in his brief on appeal that this statement was inconsistent with Mr. Winters's trial testimony and later statements. Therefore, the statement was admissible under MRE 613(b) for impeachment purposes "to prove that the witness in fact made the statement."<sup>10</sup> However, Mr. Winters admitted to making the statement and testified to its content. As this evidence reached the jury through Mr. Winters's testimony, it is unlikely that the trial court's error in excluding the actual statement affected the outcome of defendant's trial.

---

<sup>7</sup> *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

<sup>8</sup> *Id.*

<sup>9</sup> MRE 803(3) (emphasis added). See also *People v Fisher*, 449 Mich 441, 448-451; 537 NW2d 577 (1995) (statements showing marital discord admissible to prove the defendant's motive and premeditation in killing his wife).

<sup>10</sup> *Morrow v Bofferding*, 458 Mich 617, 631; 581 NW2d 696 (1998).

### III. Ineffective Assistance of Counsel

Defendant contends that the trial court erred in denying his motion for a new trial following a *Ginther*<sup>11</sup> hearing on the basis of ineffective assistance of counsel. Effective assistance of counsel is presumed and defendant bears a heavy burden to prove otherwise.<sup>12</sup> To establish ineffective assistance of counsel, defendant must prove that counsel's deficient performance denied him the Sixth Amendment right to counsel and that, but for counsel's errors, the proceedings would have resulted differently.<sup>13</sup> Defendant must overcome the strong presumption that counsel's performance was sound trial strategy.<sup>14</sup> To overcome this presumption, defendant must show that counsel's alleged error affected the outcome of the trial, for instance, by depriving defendant of a substantial defense.<sup>15</sup>

Defendant argues that counsel was ineffective for failing to investigate and interview witnesses. Specifically, defendant argues that his trial counsel failed to interview employees of Green's Barbeque. Defendant contends that trial counsel should have interviewed the owner and Joseph Moore, a cook who was waiting for a bus and saw the entire incident. However, the evidence presented at defendant's *Ginther* hearing showed that defense counsel diligently investigated the case, visited the crime scene, and located and interviewed witnesses. Defense counsel testified that he interviewed the owner of the restaurant, although the owner claimed that neither party spoke to him. Although defense counsel failed to discover Mr. Moore's identity as a witness, the evidence showed that Mr. Moore purposely failed come forward. There is evidence that, at the time of defendant's trial, no one connected with the defense or the prosecution knew that Mr. Moore was a witness.<sup>16</sup> Therefore, we cannot conclude that defense counsel was ineffective for failing to identify this witness before trial.

While additional evidence may have been uncovered by more carefully interviewing the parking lot attendant and restaurant owner, there is no evidence that defense counsel's interview techniques were deficient. Defendant failed to establish that evidence that could have been elicited from these witnesses—testimony that Mr. Winters came out of the restaurant following the shooting with a gun—could have affected the outcome of defendant's trial. Furthermore, contrary to defendant's assertion, the parking lot attendant *did* testify at trial that no one

---

<sup>11</sup> *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

<sup>12</sup> *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

<sup>13</sup> *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001).

<sup>14</sup> *Id.* at 600.

<sup>15</sup> *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994).

<sup>16</sup> Mr. Moore testified that, at some point unknown, he spoke to someone from the neighborhood named "Joe" and told "Joe" what he saw. "Joe" showed Mr. Moore defendant's picture and Mr. Moore indicated that defendant was not the shooter. Sometime later, "Joe" allegedly returned with a lawyer and took Mr. Moore's statement. "Joe's" identity is not part of the record and the record is devoid of evidence connecting "Joe" to either party.

followed Mr. Brazier through the parking and to the front door of the restaurant. Therefore, defendant has failed to show that counsel's alleged error in this regard deprived him of a substantial defense.

Defendant also argues that counsel was ineffective for failing to argue that Mr. Winters's first statement to the police, made at the hospital shortly after the shooting, was admissible under MRE 613(b). Defendant asserts that he was prejudiced by this error as the jury's request to see the statement during deliberation was denied. As noted previously, the prosecution concedes that the evidence was properly admissible. However, Mr. Winters admitted to making the statement and testified extensively regarding its content. Furthermore, contrary to defendant's argument, there is no indication that the trial court improperly instructed the jury to ignore Mr. Winters's testimony regarding his first statement.<sup>17</sup> As the jury heard the content of the statement and was properly instructed regarding the scope of the evidence, defendant was not prejudiced by counsel's error.

Defendant asserts that trial counsel failed to lay the proper foundation to admit Ms. Givhan's telephone bill as a record of a regularly conducted activity pursuant to MRE 803(6). Defendant alleges that he was prejudiced by this error, as the jury also requested the bill during deliberation. However, Ms. Givhan testified concerning the substance of the information contained within the telephone record, and, as previously noted, the trial court properly instructed the jury regarding the scope of the evidence. Furthermore, the cellular telephone bill would not be particularly relevant. It could not pinpoint Ms. Givhan's location at the time of the call. Therefore, defendant was not prejudiced by counsel's failure to lay a proper foundation for the bill's admission.

In sum, while defense counsel committed some errors leading to the exclusion of otherwise admissible evidence, defendant has failed to show that the evidence, if admitted, could have affected the outcome of his trial. Accordingly, the trial court properly denied defendant's motion for a new trial on the basis of ineffective assistance of counsel.

---

<sup>17</sup> The trial court correctly instructed the jury that it could not consider evidence that had been excluded, such as Mr. Winters's first statement. The court also correctly instructed the jury that it could only consider properly admitted evidence and the sworn testimony of the witnesses. Finally, when the jury asked for Mr. Winters's statements, the court correctly instructed the jury to rely on its collective memory. As the court's instructions were proper, counsel was not required to object. *People v Kulpinski*, 243 Mich App 8, 27; 620 NW2d 537 (2000).

#### IV. Newly Discovered Evidence

Defendant also argues that a new trial is required because of newly discovered evidence.<sup>18</sup> Specifically, defendant argues that Mr. Moore's identity as a witness could not have been discovered prior to trial. Defendant further contends that Mr. Moore's testimony positively indicates that defendant was not the shooter and casts further doubt on Mr. Winters's credibility. A trial court's decision on a motion for a new trial based on newly discovered evidence is reviewed for an abuse of discretion.<sup>19</sup>

For a new trial to be granted on the basis of newly discovered evidence, a defendant must show that: (1) "the evidence itself, not merely its materiality, is newly discovered"; (2) "the newly discovered evidence was not cumulative"; (3) "the party could not, using reasonable diligence, have discovered and produced the evidence at trial"; and (4) the new evidence makes a different result probable on retrial.<sup>[20]</sup>

The fact that trial testimony was perjured may be sufficient grounds for a new trial if the defendant makes these required showings.<sup>21</sup>

At the evidentiary hearing, Mr. Moore testified that, while waiting for a bus after his shift at Green's Barbeque, he saw a man standing on the corner of Mack and Canton. The man walked past Mr. Moore to the middle of Canton Street and turned around facing south. Mr. Moore then heard approximately three shots. Although Mr. Moore did not actually see the man shoot a gun, he heard shots and saw muzzle flashes coming from where the man was standing. Mr. Moore ducked behind the wall surrounding the parking lot and heard someone running through the alley, screaming that he had been shot. Mr. Moore looked up and saw a man run through the parking lot and into the restaurant. The shooter then ran into a vacant house on the corner, came back out and walked north on Canton. Mr. Moore did not see a gun in his hand. Mr. Moore testified that he clearly saw the shooter, who was "approximately six-three, real tall guy, light skinned," and had a "bald head." Mr. Moore claimed that he would not recognize the

---

<sup>18</sup> Contrary to the prosecutor's contention, we do not view defendant's argument as a claim that the jury's verdict was against the great weight of the evidence. Rather, defendant is arguing that he is entitled to a new trial because newly discovered evidence demonstrates that he was not the shooter and that Mr. Winters's trial testimony may have been perjured. It is apparent that appellate counsel failed to clearly argue this issue to the trial court in the context of defendant's motion for a new trial. Thus, in denying defendant's motion, the trial court considered only the question of Mr. Winters's alleged perjury. It did not directly address the distinct claim that a new trial was warranted on the basis of newly discovered evidence.

<sup>19</sup> *People v Cress*, 468 Mich 678, 692; 664 NW2d 174 (2003).

<sup>20</sup> *Id.* at 692, quoting *People v Johnson*, 451 Mich 115, 118 n 6; 545 NW2d 637 (1996) and MCR 6.508(D).

<sup>21</sup> *People v Mechura*, 205 Mich App 481, 483; 517 NW2d 797 (1994).

man now. However, he was certain that defendant was not the shooter because defendant is “dark-skinned.” Mr. Moore did not give a statement to the police that night. He took a bus home after Mr. Brazier was taken to the hospital. Mr. Moore never spoke to the prosecution or defense counsel and he was not subpoenaed for trial. Mr. Moore explained that he failed to come forward because he did not want to be involved.

We find that Mr. Moore’s testimony is newly discovered evidence warranting a new trial. Although defense counsel diligently investigated the case and interviewed witnesses, Mr. Moore left the premises before he could be discovered and purposely failed to come forward. There is no indication that defense counsel was aware of Mr. Moore’s existence until after defendant’s trial. Accordingly, the evidence itself, and not merely its materiality, was newly discovered. Furthermore, Mr. Moore’s identity as a witness could not have been discovered with any amount of diligence due to his evasive actions.

Mr. Moore saw the shooter and was certain that it was not defendant. Mr. Moore further contradicted Mr. Winters’s identification of defendant by testifying that no one followed Mr. Brazier through the restaurant parking lot to the front door. Mr. Moore’s testimony, at the least, casts doubt on Mr. Winters’s credibility and tends to show that Mr. Winters may have perjured himself when he testified that he saw defendant standing at the front door holding a weapon. Defendant established the grounds for a new trial based on newly discovered evidence—the testimony of Mr. Moore. Therefore, the trial court abused its discretion in denying defendant’s motion.<sup>22</sup>

Reversed and remanded for a new trial based on newly discovered evidence. We do not retain jurisdiction.

/s/ Janet T. Neff  
/s/ Jessica R. Cooper  
/s/ Roman S. Gibbs

---

<sup>22</sup> Defendant also asserts that the parking lot attendant and restaurant owner’s testimony indicating that Mr. Winters went outside and fired a weapon following the shooting is newly discovered evidence. However, testimony regarding Mr. Winters’s actions immediately following the shooting would not likely affect the outcome of defendant’s trial. Accordingly, a new trial is not warranted based on this evidence. Furthermore, in light of our disposition, it is unnecessary to address defendant’s argument that the cumulative effect of several errors deprived him of a fair trial.